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No. 99-1613

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY;
MICHAEL MAHONEY; MYRON BEESON;
AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and freestanding right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

PARTIES

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The opinion of the Court of Appeals for the Ninth Circuit is reported at 195 F.3d 1121 and reproduced at Pet. App. 1-17. The Court of Appeals' denial of Petitioners' petition for rehearing and suggestion for rehearing en banc is unreported. Pet. App. 45. The United States District Court for the District of Montana's decision is unreported and reproduced at Pet. App. 18-26. The Magistrate Judge's Order and Findings and Recommendation are unreported and reproduced at Pet. App. 28-44.

JURISDICTION

The Court of Appeals entered its judgment on November 4, 1999 and denied a timely petition for rehearing and suggestion for rehearing en banc on January 7, 2000. The Petition for Writ of Certiorari was filed on April 6, 2000. This Court granted certiorari on September 26, 2000 and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves application of the First Amendment to the United States Constitution as incorporated through section 1 of the Fourteenth Amendment. Respondent asserts claims for relief under 42 U.S.C. § 1983.

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of title 42, United States Code, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents the issue whether a state prison inmate has a freestanding First Amendment right to provide "legal advice" to another inmate, which right immunizes the first inmate from disciplinary sanctions for violation of an otherwise valid and uniformly applied prison disciplinary policy. The Ninth Circuit held that Respondent Kevin Murphy possessed just such a right with respect to statements made in a letter to a fellow inmate concerning a pending criminal proceeding in which the inmate already was represented by court-appointed counsel.

The Court of Appeals' judgment cannot withstand scrutiny. The lower court has carved out a new species of prisoners' rights for protection, effectively creating a "legal advice" privilege, and undermined the ability of States to regulate in perhaps the most difficult area of their myriad responsibilities – maintaining order and security in prisons. While it is not entirely clear whether the Court of Appeals' newly coined privilege is grounded in the Speech Clause or in freedom of association, it is plain under this Court's prison-regulation decisions that "legal advice" has no greater constitutional protection than other forms of communication or conduct except where protected under the Court's decisions defining an inmate's right to access the courts. As the Court has explained, "an inmate does not retain those First Amendment rights that are 'inconsistent with his legal status as a prisoner or with the legitimate penological objectives of the corrections system.' " *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Here, Respondent's right to communicate with other prisoners is subject to policies that unquestionably further those objectives.

I. Factual Background

1. Two Montana State Prison ("Prison") policies form the backdrop for this controversy: the Inmate Disciplinary Policy ("MSP 15-001") and the Inmate Correspondence Policy ("MSP 16-001"). J.A. 6, 34. Also relevant is an inmate legal clerk program established by the Prison and in operation during 1995. Request for Judicial Notice, Ex. 3 (Dist. Ct. C.R. 37).

a. The Prison has promulgated a policy that details a set of rules governing inmate discipline. The objective of the policy is "[t]o provide a means of maintaining discipline and enforcing necessary rules within the institution to ensure that prisoners are provided fair, timely, and impartial disposition of charges alleging violations of rules." MSP 15-001, Objective (J.A. 6). Under this policy, "[r]ule violations are divided into three categories." *Id.*, Policy (J.A. 6). The most severe category, "Class II violations," is at issue here and is defined as "[t]hose institutional infractions which are termed a major misconduct and are considered serious." *Id.*, Definitions (J.A. 7). Two Class II rules are germane here. The first – Rule 009 – prohibits "[i]nsolence," which is defined as "[w]ords, actions or other behavior which is intended to harass or cause alarm in an employee." Examples of "insolence" include "[c]ursing; abusive language, writing or gestures directed to an employee." *Id.*, Procedures § B (J.A. 10). The second – Rule 022 – prohibits "Interference With Due Process Hearings," which includes conduct such as "making a false statement of misconduct against . . . staff which could result in a disciplinary action." *Id.*, Procedures § B (J.A. 14).[1]

---

[1] A third Class II violation – Rule 025 – proscribes "Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution." MSP 15-001, Procedures § B (J.A. 15). It is defined as "purposefully engaging in acts which disrupt the institutional security or orderly operation [of the prison]" and "interfering with an employee in the performance of his/her duties." *Id.* Examples of conduct covered by Rule 025 include "[i]nterfering with an institutional count; missing count; interfering with a shakedown; knowingly interfering with the intent to disrupt an employee conducting a count or performing any routine security procedure." *Id.*

Under the policy, an officer who witnesses a violation completes an infraction report identifying the rule violated, the time and place of the incident, a description of the violation, names of witnesses and a description of the immediate action taken. MSP 15-001, Procedures § C.1 (J.A. 15-16). The policy cautions the officer writing the report to "describe what he saw, not his conclusions about what he saw." *Id.*, Procedures § C.2 (J.A. 16). A hearings investigator then is assigned the task of investigating each major misconduct report. *Id.*, Procedures § E (J.A. 18). Ultimately, the hearings officer "determine[s] if all necessary evidence has been gathered, weigh[s] the credibility of all witnesses, determine[s] the facts in the case, and decide[s] whether those facts amount to misconduct." *Id.*, Procedures § G.1 (J.A. 21). Detailed provisions govern the hearings officer's conduct of the disciplinary hearing and permissible sanctions. *Id.*, Procedures §§ G [*sic*] & H (J.A. 21-25).

If an inmate is unsatisfied with the hearings officer's decision regarding major misconduct offenses, he may appeal "to the Warden by filling out a written request for review including his reasons for review." MSP 15-001, Procedures § J.2 (J.A. 25). The inmate is then "notified in writing of the decision of the Warden." *Id.*, Procedures § J.6 (J.A. 26). Finally, if the "inmate is not satisfied with the decision of the Warden, he may consider instituting appropriate litigation." *Id.*, Procedures § J.7 (J.A. 26).

b. The Prison also has promulgated a detailed policy which addresses incoming and outgoing inmate mail. MSP Policy 16-001 (J.A. 34). The policy does not address inmate-to-inmate correspondence within the

Prison. It distinguishes between "privileged correspondence" and "general correspondence." The former category includes mail to and from "licensed attorneys" and various legal or advocacy entities such as the Montana Defender Project, the Montana Legal Services Association, the State Bar of Montana, the American Civil Liberties Union, the Civil Rights Division of the United States Department of Justice, and the National Association for the Advancement of Colored People. *Id.*, §§ 1.A, 2.A (J.A. 34-35). Outgoing privileged communications may not be opened by prison staff unless reasonable grounds exist to believe that the mail is being sent contrary to the policy (*id.* §§ I.B.2, VII.A (J.A. 35, 43); incoming mail may be opened only in front of the inmate for the purpose of determining the presence of contraband but may not be read by prison staff (*id.* I.C.2 & .3 (J.A. 35)). Outgoing nonprivileged correspondence generally may not be opened (*id.* II.B.4 (J.A. 36)), but incoming nonprivileged correspondence is subject to being reviewed if, inter alia, "it is from another correctional facility" or "is addressed to Maximum Security or Administrative Segregation inmates" (*id.* § II.C.3.a & .c (J.A. 37)).

All inmates were aware that mail sent to the maximum security unit may be opened and read according to MSP Policy 16-001. Respondent himself acknowledged that he was aware that his letter to an inmate in the maximum security facility would be opened and reviewed by prison officials. Pl.'s Stmt. Disputed Issues ¶ 10 (J.A. 81); *see also* Reply Br. Supp. Mot. Summ. J. & Opp'n Defs.' Summ. J. at 6 (Dist. Ct. C.R. 32) ("[t]he Prison has regulated and restricted [Respondent's] and other inmates' right by reading inmate-to-inmate mail, in

the exercise of their informed discretion"). Petitioner Mahoney, the Prison's warden, also stated in a 1997 affidavit filed in support of objections to the Magistrate Judge's recommended disposition that, with respect to correspondence to prisoners incarcerated in the facility's maximum security unit, "all inmates know that mail to [such unit] may be opened and read according to MSP Policy 16-001." Aff. Mike Mahoney ¶ 14 (J.A. 97). The District Court thus noted "the MSP policy of reading all inmate correspondence entering the Maximum Security Unit." Pet. App. 20.

c. The policy governing the legal clerk program in effect during 1995 defined as its overall purpose "[t]o assist inmates in accessing the courts by offering advice concerning issues, format and proper procedure." Inmate Legal Clerk Program – Montana Defender Project/Montana State Prison § I (Request for Judicial Notice, Ex. 3 (Dist. Ct. C.R. 37)). It required "inmates needing assistance [to] report to the Librarian in charge" who, in turn, was responsible for "assign[ing] the inmate to a legal clerk." *Id.* § VI.1 The policy additionally provided that "[i]nmate legal clerks may accept only those cases assigned to them." *Id.* § VI.3. The policy stated specifically that "[i]nmates seeking assistance are not entitled to the assignment of a particular inmate law clerk." *Id.* § IX.2. Special provisions governed the program's operation with respect to inmates in the maximum security unit, where "legal clerks [were to be] separated from Max . . . inmates by the use of the Max Visiting Room." *Id.* § III.3.

2. These prison policies became relevant here as a result of a letter from Respondent to another inmate, Pat

Tracy, in February 1995. Compl., Ex. 1 (J.A. 50). Respondent was a law clerk in the high security compound at the Prison. Tracy had been charged in state district court with felony assault of a prison guard and was incarcerated in the maximum security unit. Aff. Kevin Murphy ¶ 3 (J.A. 78); Aff. Pat Tracy ¶¶ 3, 4 (J.A. 84). He had been appointed counsel in the criminal proceeding. Despite the fact that he had counsel, Tracy requested the prison librarian to assign Respondent to assist him "with those charges against me and with framing the issues." *Id.* ¶¶ 6-8 (J.A. 84). That request was denied because prison policy prohibited inmates in the high security units from visiting inmates, like Tracy, in maximum security. Aff. Kevin Murphy ¶ 3 (J.A. 78).[2] Tracy was assigned a legal clerk housed in the Prison's "low-side." Aff. Pat Tracy ¶ 10 (J.A. 84). Tracy refused to speak with this clerk "because [he] had a reputation for disclosing information obtained from meeting with inmates." *Id.*

Even though not assigned to assist Tracy, Respondent sent him the following letter on February 16, 1995:

Dear Pat:

> How ya doing? Sorry I haven't wrote before now. I been busy fighting my charges. Finally

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[2] Respondent contended before the District Court that he had never been directed to "stop providing or continuing to provide assistance to maximum security inmates" and that "[o]n the high security side [of the Prison] the process of providing assistance to inmates was informal." Supp'l Aff. Kevin Murphy ¶¶ 4, 5 (J.A. 87). There is no dispute, however, that Respondent's assistance was not authorized under the legal clerk program policy's specific terms or that Tracy's specific request for such assistance had been denied.

> got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harass inmates. He has made homo-sexual advances towards certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another poiont [*sic*] is that he grabbed you from behind. You tell your lawyer to get ahold [*sic*] of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .
>
> Murph

Compl., Ex. 1 (J.A. 50). Respondent was aware that prison officials would read this correspondence. Supp'l Aff. Kevin Murphy ¶ 10 (J.A. 88).

Petitioner Shaw, a correctional officer, in fact read the letter. Shaw believed the letter violated several Class II rules under the Inmate Disciplinary Policy: Rule 009 – Insolence; Rule 022 – Interference with Due Process Hearings; and Rule 025 – Conduct Which Disrupts or Interferes with the Security or Orderly Operation of the Institution. MSP Policy 15-001, Procedures § B (J.A. 10, 14-15). He accordingly issued a separate Major Misconduct Violation Report for each alleged violation. The Rule 009 report read:

> While routinely monitoring institutional mail I (C.S. Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy. In this letter, Inmate Murphy accused CO Galle of being an over zealous guard who punishes and harasses Inmates for personal pleasure. Inmate Murphy also accussed [*sic*] CO Galle of making homosexual advances towards Inmates. Inmate Murphy stated that CO Galle retaliated against Inmate Murphy by writing him up on two rule violations.

Compl., Ex. 2 (J.A 52). In pertinent part, the Rule 022 report stated:

> While routinely monitoring institutional mail I (C.S. Shaw) noticed comments in a letter from Inmate Murphy to Inmate Tracy concerning an incident that had occurred with an assault on CO Galle. In this letter, Inmate Murphy tries to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which Inmate Murphy is no part of. Inmate Murphy states he tried to "do something" about CO Galle but He (Murphy) was retaliated against.

> There is no evidence in of any the statements in this letter to be fact.

Id. (J.A. 54). Lastly, the Rule 025 report alleged that Respondent's comments were

> intended to persuade Inmate Tracy to perform certain actions to make a situation that Murphy is involved in look better. Inmate Murphy also stated "We must pursue this out of the Prison system." Inmate Murphy also stated "Well I will write again when I have this thing against Galle finished." Both statements are threatening.

Id. (J.A. 57). Respondent denied each of the violations. Compl., Ex. 3 (J.A. 59, 61).

Petitioner Bearley served as the hearings officer and concluded that Respondent had violated Rule 009 and Rule 022, but not Rule 025. With respect to Rule 009, he reasoned that the letter "states C/O Galle retaliated against inmate Murphy by issuing him a class II infraction" and that such "statement indicates unprofessional actions which stand to intimidate the employee." Compl., Ex. 3 (J.A. 60). A Rule 022 violation was found because "[t]he statement inferring to C/O Galle making homo sexual [*sic*] advances to another inmate would result in disciplinary action against stated employee of the D.O.C." *Id.* (J.A. 62). Petitioner Bearley imposed concurrent sentences of five days' detention for the offenses, which he suspended pending 90 days of "clear conduct." *Id.* (J.A. 59, 61). Respondent also received three points that could be used to reclassify him to a higher custody level. Aff. Kevin Murphy ¶ 6 (J.A. 78).

Petitioner Mahoney denied Respondent's appeal of Petitioner Bearley's adverse decisions. Aff. Kevin Murphy ¶ 7 (J.A. 78). Respondent did not raise in the proceedings below or elsewhere a claim based on an alleged absence of a sufficient quantum of evidence to support the findings that his conduct violated Rules 009 and 022. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). Prison staff, finally, never delivered the letter to Tracy. He pled guilty in the criminal proceeding to assaulting the guard. Aff. Pat Tracy ¶¶ 11, 12 (J.A. 84).[3]

II. Proceedings Below

In October 1995 Respondent filed a class action under 42 U.S.C. § 1983 on his own behalf and that of present and future inmates and inmate law clerks. Compl. (J.A. 63). He alleged violation of the First Amendment because of "Defendants' practice of disciplining inmate law clerks for the content of their communications with other inmates" and denial of access to the courts "by denying [inmates] the assistance of an inmate law clerk." *Id.* ¶ 17 (J.A. 66). Respondent further challenged Petitioners' enforcement of Rules 009 and 022 under the First Amendment and the Due Process Clause as vague and overbroad. *Id.* ¶¶ 20, 21 (J.A. 67). He sought declaratory and injunctive relief against such enforcement and against

[3] The other Petitioners, Myron Beeson and Richard S. Day, were not involved in Respondent's discipline. Petitioner Beeson was a bureau warden at the Prison in 1995, while Petitioner Day was director of the Montana Department of Corrections at that time. Beeson is currently a deputy warden; Day remains director of the Department.

"[d]isciplining inmate law clerks for communications with inmate clients." *Id.*, Prayer for Relief ¶ 4 c) (J.A. 68).

The parties filed cross-motions for summary judgment. The Magistrate Judge entered a recommended decision in February 1997 denying the motions, except with respect to Respondent's access-to-courts claim, on the ground that questions of fact existed relevant to application of the standards in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Pet. App. 28. The Magistrate Judge additionally recommended denial of Respondent's motion for class certification because he was no longer a legal clerk and because the number of clerks was insufficient so as to make their joinder impracticable under Fed. R. Civ. P. 23(a)(1). Pet. App. 43-44. Objections to the recommended disposition were filed by all parties.

The District Court granted Petitioners' motion for summary judgment and denied Respondent's class action certification motion. Pet. App. 18. The court rejected Respondent's First Amendment claim because Petitioners had justified adequately the inmate correspondence policy under *Turner* on the basis of an affidavit filed by Petitioner Mahoney. Pet. App. 22-23. It further found that the record showed Respondent had not been acting as an authorized legal clerk in his letter to Tracy, since the requisite assignment by the prison librarian had not occurred and since Respondent "was not permitted to work for inmate Tracy because both inmates resided in the high security side of the prison." Pet. App. 23-24. On the basis of this conclusion, the District Court held not only that Respondent's access-to-courts claim failed but also that the restraint on his ability to communicate did

not "exceed the inmate's sentence in an unexpected manner" so as to violate the Due Process Clause. Pet. App. 24. The court deemed Respondent's overbreadth and vagueness claims predicated on the existence of viable First Amendment and due process rights and therefore dismissed them because the Prison's correspondence policy satisfied *Turner*. Pet. App. 25. The court denied the class certification motion because Respondent was no longer a legal clerk.

Respondent appealed the grant of summary judgment. Pet. App. 6 n.4. The Court of Appeals reversed.[4] In

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[4] Before oral argument below, the Court of Appeals directed Respondent's counsel to answer certain questions about Respondent's custody status because of a statement in the District Court's decision indicating that Respondent had been paroled and the possibility of mootness. J.A. 99; *see also* Pet. App. 18. Counsel's response stated that Respondent was incarcerated in the Montana State Prison, Great Falls Regional Prison, as the result of committing an additional felony. J.A. 100. Respondent presently is incarcerated at the Prison in Deer Lodge, Montana, on concurrently running sentences for three felonies committed shortly after release from the Prison in September 1996. If the Court of Appeals' judgment is affirmed, declaratory relief would appear appropriate with respect to communications by Respondent containing, or purportedly containing, "legal advice," together with expungement of the major misconduct violations under Rules 009 and 022. *See* Mont. Admin. R. 20.25.504(2)(l) (Board of Pardons may consider in parole decisions "[t]he offender's conduct in the institution, including particularly whether the inmate . . . is clear of major disciplinary reports prior to the hearing"). The possibility of detention sanctions, the assessment of reclassification points, and the relevance of any major misconduct violations in an inmate's past institutional history to parole determinations may influence Respondent's willingness to offer "legal advice" absent such relief.

so doing, it relied upon a prior Ninth Circuit decision to hold that respondent had "a First Amendment right to assist other inmates with their legal claims." Pet. App. 6 (citing *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)). The court then applied the four-part balancing test set forth in *Turner* and concluded that, in light of respondent's First Amendment right to assist other inmates with legal matters, the application of Montana's prison policies to Respondent's conduct was invalid and could not stand because it was " 'an exaggerated response.' " Pet. App. 14.

First, without citing to a legal or factual basis, the Court of Appeals stated that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." Pet. App. 12. The court sought to buttress this general conclusion with the observation that Petitioners "ha[d] little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield corrections officers from any 'alarming' statements contained in inmate mail." *Id.* The court thus opined that "the 'logical nexus' here between the governmental interest and the application of the rules to law clerk correspondence is weak." Pet. App. 13.

Second, the Court of Appeals speculated that Respondent had no "alternative means to exercise his right to render legal assistance to maximum security inmates" whom he could not visit personally. Pet. App. 13. Effectively placing the burden on Petitioners to establish the existence of an "alternative means," the court rejected the contention that Respondent could have communicated with Tracy's appointed counsel directly

because "there is nothing in the record indicating that Murphy had access to that lawyer's name and address." *Id.*

Third, the Court of Appeals dismissed the claim that immunizing law clerks from discipline "based on the content of the legal advice they provide" would have any significant impact on the prison employees, inmates or resources. Pet. App. 13. It stated that Respondent did not seek immunity from correspondence being intercepted and reviewed and that prison officials therefore "could continue to monitor correspondence and discipline law clerks for any improper material *that does not relate to legal action.*" Pet. App. 13-14 (emphasis supplied). In the court's view, the Prison could reorganize its staffing patterns so that "corrections officers who directly interact with inmates are shielded from the mail" and that, with such reorganization, there would be no risk that officers would be exposed to "alarming" statements about themselves. Pet. App. 14. Lastly, the court posited that an "easy, obvious alternative[ ]" to enforcement of Rule 009 is the "shielding [of] correction officers who have direct contact with inmates from inmate mail" and added that "[t]he fact the prison officials will read the legal correspondence should be adequate protection against implementation of any plan to interfere with Due Process Hearings (Rule 022)." *Id.*[5]

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[5] In the remainder of its decision, the Court of Appeals declined to address the question whether interference "with law clerk mail infringes on inmates' right of access to the courts" in light of the *Turner*-based First Amendment ruling. Pet. App. 15.

SUMMARY OF ARGUMENT

1. To the extent the Court of Appeals relied on the Speech Clause in the First Amendment for its holding that Respondent enjoys immunity from discipline for statements made during the course of providing "legal advice," it ignored the teachings of *Turner v. Safley*, 482 U.S. 78 (1987), and other decisions of this Court. *Turner* instructs generally that, in light of the inordinately difficult undertaking embodied in prison administration, federal courts must accord wide-ranging deference to prison administrators – especially those responsible for state institutions. As a consequence, policies that are "reasonably related to legitimate penological interests" will be upheld under *Turner* against a claim that a constitutional right has been violated. *Turner* itself involved a First Amendment challenge to an inmate-to-inmate mail policy and stands for the proposition that prison administrators may sanction prisoners for the content of communications if the discipline is grounded in "neutral" criteria advancing otherwise appropriate institutional interests. *See Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989).

The Court of Appeals' conclusion that "legal advice" has special protection under the Speech Clause cannot be reconciled either with *Turner*'s particular facts or with

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The court also declined to resolve an as-applied vagueness challenge to Rules 009 and 022. *Id.* It did consider, and reject, Respondent's facial vagueness challenge to the rules because "the regulations certainly provide adequate notice to prisoners generally." Pet. App. 16. The court remanded the matter to the District Court "for the crafting of an appropriate remedy." Pet. App. 17.

application of the four *Turner* factors against which this Court measures the reasonableness of a prison policy. First, the mail regulation at issue in *Turner*, as applied at the involved facility, did not treat inmate correspondence dealing with legal matters differently than non-legal correspondence. This Court also referred approvingly to Federal Bureau of Prison regulations that stringently restricted inmate mail dealing with legal matters. It thus makes no sense to conclude, as the Ninth Circuit did, that Respondent could not be sanctioned pursuant to the Prison's discipline policy when the validity of the policy with respect to other forms of speech has been admitted.

Second, application of the *Turner* factors establishes that it is entirely reasonable for prison administrators to treat "legal advice" the same as other speech for purposes of discipline under MSP 15-001. The security concerns raised by mail containing "legal advice" are identical to those attendant to non-"legal advice" correspondence, while according special status to inmates who give "legal advice" may raise additional institutional difficulties. The discipline policy's application to mail containing "legal advice" also does not burden such correspondence to a greater degree than other speech. Finally, the difficulty in distinguishing "legal advice" from non-"legal advice" would impose far more than a de minimis burden on prison resources. Indeed, the last of these considerations is borne out by Respondent's own vacillating positions over whether his letter to Tracy is characterized properly as "legal advice."

2. To the extent the Court of Appeals relied on First Amendment associational principles to create a right to assist other inmates with "legal advice" immune from

application of MSP 15-001, it pursued a path foreclosed by *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977). *Jones* applied a reasonableness standard comparable to that in *Turner* in rejecting a Speech Clause and associational right challenge to prison regulations prohibiting, inter alia, inmate union solicitation. Here, it is doubtful that associational rights are even "barely implicated" by application of the discipline policy to "legal advice" communications, since the policy does not prohibit those communications but, instead, merely sanctions specified conduct that is found inconsistent with "reasonable considerations of prison management." The same result obtains when the factors identified in the later-decided *Turner* are applied.

3. The Court of Appeals' decision has the effect of expanding significantly the otherwise narrowly tailored access-to-court doctrine. In creating a new "legal advice" privilege under the First Amendment, the Ninth Circuit has upset the balance that this Court struck between non-interference with prison administration and inmates' ability to initiate proceedings concerned with the validity or the conditions of their incarceration. The lower court, in practical effect, has created a freestanding right to *receive* legal assistance, which this Court stated in *Lewis v. Casey*, 518 U.S. 343 (1996), did not exist, by creating a right to *give* such assistance. Here, moreover, the undisputed facts showed the absence of an access-to-courts claim. First, neither Respondent nor even Tracy possessed standing to maintain such a claim. *Johnson v. Avery*, 393 U.S. 483, 487 (1969); *Lewis*, 518 U.S. at 351. Second, Respondent's "legal

advice" to Tracy was directed to a criminal proceeding in which he had a court-appointed attorney. *Id.* at 353.

ARGUMENT

The Court of Appeals' decision described the nature of the First Amendment right "implicated" by Respondent's discipline in differing ways. At the beginning of its analysis, the court cited prior circuit authority for the proposition that his claim "turns on application of two established legal principles" – the first of which is "that inmates have a First Amendment right to assist other inmates with their legal claims." Pet. App. 6. The court later stated that the imposition of discipline on Respondent also implicated his First Amendment right to communicate by letter. Pet. App. 8-9. It then stated that the prior circuit authority – *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985) – had "held that [an inmate's] legal activities on behalf of other inmates implicated associational rights protected by the First Amendment" and that, "[t]o the extent such a right exists, the Prison's decision to discipline Murphy in the instant case undoubtedly interferes with that right." Pet. App. 9 (footnote omitted).

The Ninth Circuit's conclusions at their core ignore this Court's precedent which dictates that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the correctional system, to whose custody and care the prisoner has been committed in accordance with due process of law." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). As discussed in Part I, insofar as

the Court of Appeals relied on the Speech Clause to immunize communications containing purported "legal advice" from sanctions under a discipline policy that admittedly may be applied to other forms of speech and thereby created a "legal advice" privilege, it plainly erred under standards established by this Court. The Court of Appeals' reliance on associational interests as a basis for the same freestanding First Amendment "legal advice" privilege was also erroneous and is discussed in Part II. Finally, the incompatibility of the Ninth Circuit's newly created First Amendment "legal advice" right and the access-to-courts doctrine as developed by this Court is discussed in Part III.

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT "LEGAL ADVICE" CONVEYED FROM ONE INMATE TO ANOTHER INMATE ENJOYS PROTECTED STATUS UNDER THE SPEECH CLAUSE IN THE FIRST AMENDMENT.

A. This Court's Prisoner Mail Decisions Establish That Prisons May Prohibit, Censor, and Punish Under "Neutral" Criteria Inmate-to-Inmate Mail Without Violating the First Amendment's Speech Clause.

This Court has addressed the relationship of inmate mail regulation and the First Amendment in several decisions. The first of these cases, *Procunier v. Martinez*, 416 U.S. 396 (1974), involved a challenge to California administrative rules that authorized censorship of prisoner mail received from or sent to persons, other than licensed attorneys and public office holders, outside the institution – i.e., "outgoing" or "incoming" mail. Those rules

permitted review of the mail to determine compliance with certain standards prohibiting, inter alia, "letters in which [prisoners] 'unduly complain' or 'magnify grievances[ ]' " or "express[ ] inflammatory political, racial, religious or other views or beliefs." *Id.* at 399; *see also id.* at 415 (discussing mailroom checklist used at one facility that "authorized rejection of letters 'criticizing policy, rules or officials[ ]' "). The Court initially emphasized that, "[t]raditionally, the federal courts have adopted a broad hands-off attitude toward problems of prison administration" because "the problems of prisons are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree." *Id.* at 404-05. "Courts," in short, "are ill-equipped to deal with the increasingly urgent problems of prison administration and reform[,]" and deference to prison administrators – particularly where state facilities are under scrutiny – is warranted. *Id.* at 405.

The *Martinez* Court nevertheless recognized its obligation "to take cognizance of valid constitutional claims whether arising in federal or state institutions." 416 U.S. at 405. Where incoming and outgoing inmate mail was involved, such claims presented special difficulties because not only the First Amendment speech rights of prisoners were implicated but also those of nonprisoners. *Id.* at 409. Since the regulations affected both prisoners and nonprisoners, the Court stated that prison officials "must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation" and that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of

the particular governmental interest involved." *Id.* at 413-14. The California policy did not pass muster under these rigorous criteria, since the prison officials had contended "not that the regulations are justified by a legitimate state interest but that they do not need to be" and since, in fact, the "regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration." *Id.* at 415-16.

That the stringent standard set in *Martinez* was premised on the constitutional rights of the non-incarcerated party and that far more deference must be accorded prison administrators with respect to regulation of inmate-to-inmate communications was made clear thirteen years later in *Turner*. There, the Court distinguished *Martinez* and rejected a strict scrutiny standard for reviewing prison regulations. In so ruling, the Court explained that its decisions since *Martinez* had held that the proper standard was whether the prison regulations were " 'reasonably related' to legitimate penological objectives." 482 U.S. at 87.[6] The *Turner* Court embraced

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[6] *Pell v. Procunier*, 417 U.S. 817, 826 (1974) (prohibition against in-person media interviews with inmates but not visitations from families, clergy, attorneys, and friends of prior acquaintance; "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, 'prison officials must be accorded latitude' "); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977) (prohibition of prisoner union mailings, meetings and solicitations; "[a]n examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge[ ] demonstrates that the restrictions imposed are reasonable, and are consistent with the inmates' status as

this deferential standard and the sharp curtailing of inmates' speech rights for two reasons.

First, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." 482 U.S. at 89; *see Jones*, 433 U.S. at 129 ("[p]risons, it is obvious, differ in numerous respects from free society" because they "are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance"). Second, adoption of a strict scrutiny standard would mean that "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.* Four factors then were distilled from the earlier prisoners' rights cases to guide the

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prisoners and with the legitimate operational considerations of the institution"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (restriction on incoming hardback book mailings; "judicial deference is accorded not merely because the [prison] administrator will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"); *Block v. Rutherford*, 468 U.S. 576, 586 (1984) (prohibition of "contact" visitations; given absence of dispute over internal security as a legitimate governmental interest, "our inquiry is simply whether petitioners' blanket prohibition on contact visits . . . is reasonably related to the security of that facility").

reasonableness assessment: (1) whether there was "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates[ ] and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives." *Id.* at 89-90.

Applying the four-factor test, this Court upheld the incoming inmate-to-inmate mail prohibition. It relied on testimony from Missouri prison officials concerning the potential of employing such mail to facilitate unlawful gang activity; the fact that "the correspondence regulation does not deprive prisoners of all means of expression;" a "tradeoff" between the exercise of the claimed First Amendment right by one class of inmates and "liberty and safety for everyone else, guards and prisoners alike;" and the prison officials' concerns over the feasibility of reading every piece of inmate mail so as to capture all dangerous messages and the accompanying conclusion that the alternative of individual letter review "clearly would impose more than a de minimis cost on the pursuit of legitimate correctional goals." 482 U.S. at 92-93.[7]

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[7] The Court applied these standards almost immediately outside a prison mail context in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), where it rejected a Free Exercise Clause challenge to a prison regulation that precluded work gang members from returning to the main prison building during the day except for emergencies. This Court both reiterated the general applicability of the "reasonably related to legitimate

Lastly, in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court again applied *Turner* standards in upholding Federal Bureau of Prisons regulations that authorized prison administrators to reject incoming publications deemed detrimental to institutional security or potentially capable of facilitating criminal activity.[8] The Court,

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penological interests" standard in resolving claims under the First Amendment and stressed with respect to the "alternative means" consideration that, although the rule made it impossible for Islamic prisoners to attend some religious services on Fridays, "[i]n *Turner*[ ] we did not look to see whether prisoners had other means of communicating with fellow inmates[ ] but instead examined whether the inmates were deprived of 'all means of expression.' " *Id.* at 352.

[8] In determining that *Turner*'s reasonableness standard controlled, the Court revisited *Martinez*. Although questioning whether the earlier decision "should, or need, be read as subjecting the decisions of prison officials to a strict 'least restrictive means' test" (490 U.S. at 411), it overruled *Martinez* to the extent the analysis there might have suggested applicability of the more stringent standard with respect to incoming correspondence where the sender was not a prisoner (*id.* at 413-14). The *Abbott* Court observed that, since "outgoing correspondence was the central focus of our opinion in *Martinez*" and "[t]he implications of outgoing correspondence for prison security are of categorically lesser magnitude than the implications of incoming materials[,]" an "attempt to justify a similar categorical distinction between incoming correspondence from prisoners . . . and incoming correspondence from nonprisoners would likely prove futile." *Id.* at 413. The Court additionally recognized that "it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez*" but chose "not to go that route . . . for we prefer the express flexibility of the *Turner* reasonableness standard." *Id.* at 414.

inter alia, found the regulations to be "neutral," notwithstanding the need for assessment of an individual publication's content, because "prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security" (*id.* at 415) and because wardens themselves were required to make the assessments (*id.* at 416). With respect to consideration of the "alternative means of exercising the right," the Court reiterated that, in *Turner*, "it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available." *Id.* at 418. It was unpersuaded by criticism of the Federal Bureau's "all-or-nothing rule" under which the entire publication, and not merely objectionable pages, was censored given prison administrators' "fear that tearing out the rejected portions and admitting the rest would create more discontent than the current practice." *Id.* at 418-19. The Court reasoned that "when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*" and that "administrative convenience of this proposed alternative is also a factor to be considered." *Id.* at 419. All in all, "the broad discretion accorded prison wardens by the regulations . . . is rationally related to security interests." *Id.* at 416.

At least two principles relevant to whether the Speech Clause creates a freestanding "legal advice" privilege can be drawn from these inmate mail decisions. First, *Turner* significantly curtailed prisoners' First Amendment

rights by extending a substantial measure of deference to prison administrator determinations concerning appropriate forms of inmate regulation, including permitting or prohibiting inmate mail based on content. Challengers to prison regulations accordingly bear a "heavy burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices." *Bell v. Wolfish*, 441 U.S. 520, 562-63 (1979). Second, implicit in the right to censor all inmate-to-inmate mail is the right to adopt disciplinary rules that sanction prisoners for the content of such correspondence so long as the punishment is grounded in "neutral" criteria, i.e., criteria that are intended to advance otherwise appropriate institutional interests. As discussed in Subpart B, these principles mean that prison administrators are not required by the Speech Clause to give special status to "legal advice."

B. *Turner* Establishes That the Speech Clause Does Not Specially Protect Inmate-to-Inmate Mail Purporting to Contain "Legal Advice" From Application of Disciplinary Policy Which Admittedly May Be Applied to Communications With Other Content.

1. *Turner* is particularly relevant to whether speech concerned with legal matters is situated differently for First Amendment purposes than speech directed to non-legal issues. The Missouri Division of Corrections had promulgated regulations that prohibited mail between prisoners in different penal facilities except for three situations: correspondence " 'with immediate family

members who are inmates in other correctional institutions[;]' " correspondence "between inmates 'concerning legal matters[;]' " and correspondence when " 'the classification/treatment team of each inmate deems it in the best interests of the parties involved.' " 482 U.S. at 81-82. The *Turner* litigation, however, focused on one facility, the Renz Correctional Institution, and this Court pointed to a district court finding of a substantially more restrictive practice there. *Id.* at 82. The referenced finding of the trial court stated:

> The provisions of the divisional correspondence regulation allowing the classification/treatment team of each inmate to prohibit inmate-to-inmate correspondence have not been followed at Renz. . . . At Renz, however, the rule as practiced is that inmates may not write non-family inmates or receive mail from non-family inmates. The more restrictive practice is set forth in the Renz Inmate Orientation Booklet presented to each inmate upon arrival at Renz. The restrictive rule at Renz is commonly known throughout the Missouri Correctional System.

Safley v. Turner, 586 F. Supp. 589, 591 (W.D. Mo. 1984), *aff'd*, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part & rev'd in part*, 482 U.S. 78 (1987). The district court further stated in a later finding:

> Under an unwritten rule at Renz, prior approval is required before an inmate may write to another inmate regarding legal matters. Absent this approval, inmate-to-inmate legal mail routinely is opened, stopped, and refused in violation of the Department of Corrections' written rule.

Id.; *see also Safley v. Turner*, 777 F.2d 1307, 1310-11 (8th Cir. 1985) ("[t]he challenged rule, both on its face and as applied, purports to eliminate all manner of correspondence between inmates not 'approved' by the classification/treatment team"), *aff'd in part & rev'd in part*, 482 U.S. 78 (1987). There was thus no dispute that, at the Renz facility, correspondence dealing with legal matters was regulated in much the same, if not the same, manner as other correspondence between non-family members.

That the mail policy at the Renz facility was more restrictive than the Division of Corrections' rule was discussed in the *Turner* majority opinion and in the concurring and dissenting opinion. 482 U.S. at 93 n.*; *id.* at 105-12 (Stevens, J., concurring in part and dissenting in part). Responding to Justice Stevens' contention concerning the unreasonableness of "the total ban on correspondence between inmates at Renz and unrelated inmates in other correctional facilities" (*id.* at 105), this Court noted that, aside from differences in institutional security concerns between the Renz facility and other Missouri prisons, "the Renz rule is consistent with the practice of other well-run institutions, including institutions in the federal system" (*id.* at 93 n.*). Under Federal Bureau of Prisons regulations then in effect, inmate-to-inmate correspondence was quite restricted:

> An inmate may be permitted to correspond with an inmate confined in any other penal or correctional institution, providing the other inmate is either a member of the immediate family, or is a party or a witness in a legal action in which both inmates are involved. The Warden may approve such correspondence in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence. The following additional limitations apply:
>
> (a) Such correspondence at institutions of all security levels may always be inspected and read by staff at the sending and receiving institutions (it may not be sealed by the inmate); and
>
> (b) The Wardens of both institutions must approve of the correspondence.

28 C.F.R. § 540.17 (1986).[9] Given the absence of any suggestion in *Turner* that an outright prohibition of inter-prisoner correspondence containing "legal advice" and the Court's explicit recognition that in "well-run institutions" such correspondence is regulated more stringently than alleged by Respondent, there is no basis upon which to conclude that inmate-to-inmate mail concerned with legal proceedings is not situated comparably for First Amendment purposes with mail containing other content. That, however, is what the Court of Appeals did below: It has required prison administrators to treat inmate-to-inmate "legal advice" differently than any other type of prisoner correspondence.

2. The conclusion warranted by the language of the prison policy approved in *Turner* additionally comports with that decision's reasonableness standard. It makes

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[9] Section 540.17 was modified subsequent to *Turner* (61 Fed. Reg. 65,204 (1995)), but the first sentence of the regulation was not changed substantively. *See* 28 C.F.R. § 540.17 (1999).

perfect sense for prison administrators like Petitioners to treat correspondence that may contain "legal advice" the same as other forms of speech for purposes of prison discipline under MSP 15-001. Several general considerations and Respondent's own protean positions in this litigation bear witness to such reasonableness when measured under the four *Turner* factors.

First, the security concerns raised as an ordinary matter by inmate-to-inmate mail in *Turner* apply with equal force to correspondence that may contain "legal advice." Petitioner Mahoney's affidavit before the District Court identified various objectives underlying the Prison's correspondence policy, including discovering facts relevant to plots about correctional staff, plots concerning the use of false testimony, formation and activities of gangs, and anticipated or consummated illegal conduct. Aff. Mike Mahoney ¶¶ 4, 6, 8 (J.A. 96-94). It takes little imagination to envision inmates using coded communications in the form of "legal advice" to carry out or facilitate any of the activities identified by Warden Mahoney. *See Jones*, 433 U.S. at 132 ("The interest in preserving order and authority in the prison is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever present potential for violent conflict and conflagration"). Moreover, as members of this Court and the amici curiae States have recognized, the "legal advice" privilege created by the Court of Appeals carries with it unique possibilities for abuse and institutional disruption. *Johnson v. Avery*, 393 U.S. 483, 499 (1969) (White, J., dissenting) ("[m]any assert that the aim of the jailhouse lawyer is not the service of truth and

justice, but rather self-aggrandizement, profit, and power"); Amicus Curiae Br. States of Florida et al. at 8 (observing that the decision below has the potential to elevate "any inmate who purports to provide legal assistance" to a position of power). This sort of judgment call falls precisely into the area of prison-administrator discretion that the federal judiciary should not trench upon. *See Sandin v. Conner*, 515 U.S. 472, 486 (1995) (counseling "appropriate deference and flexibility to state officials trying to manage a volatile environment").

Second, application of MSP 15-001 in a non-discriminatory manner to "legal advice" does not burden the exercise of speech or other fundamental constitutional rights any more than application of the disciplinary policy to other forms of speech. Inmates may engage in both kinds of speech under exactly the same terms. The second *Turner* factor thus is satisfied because MSP 15-001 does not deprive prisoners of *any*, much less *all*, "means of [legitimate] expression." *Turner*, 482 U.S. at 78.

Third, it is possible for letters containing such advice also to discuss plainly non-legal matters, as did the last paragraph of Respondent's letter to Tracy. Prison administrators accordingly would be confronted with distinguishing between "legal" and "non-legal" advice to determine the scope of an inmate's immunity from discipline. Characterization of content as "legal" or non-"legal," needless to say, can be problematic. So, for example, the statement in the letter's first paragraph concerning Respondent's receipt of two retaliatory "writeups" from the guard was the basis for the Rule 009 violation. That statement only remotely, if at all, can be said to

relate to "legal advice" concerning Tracy's criminal proceeding, since whether those "writeups" were retaliatory has no relevance to whether the guard "provoked" the assault by Tracy. The same can be said about the allegation of the guard's homosexuality, the basis of the Rule 022 violation. The Court of Appeals itself made no effort to define what constitutes "legal advice" generally, and the absence of such an effort is understandable given the term's inherently uncertain scope. Prison administrators, meanwhile, are left with the day-to-day, letter-by-letter task of making virtually instantaneous determinations concerning whether correspondence contains "legal advice." This line-drawing would tax the most skilled of jurists who have the luxury of time. The corresponding burden would have an undoubted " 'ripple effect' . . . or prison staff" (*Turner*, 482 U.S. at 90) and "clearly would impose more than a *de minimis* cost on the pursuit of legitimate corrections goals" (*id.* at 93) – consequences relevant to the third and fourth *Turner* considerations.

Respondent's own vacillating positions reveal the difficulties in characterizing particular content as "legal advice." His complaint requested, inter alia, relief "[d]eclaring that the Defendants' practice of disciplining inmate law clerks based on the content of their advice to other inmates violates the clerks' and inmates' rights pursuant to the First Amendment and 28 U.S.C. § 2254" – relief that would have been irrelevant unless his letter to Tracy purportedly contained "legal advice." Compl., Prayer for Relief ¶ 3 (J.A. 67-68). Before the Court of Appeals, his principal brief argued that "the essence of Murphy's communication was, 'don't plead guilty, you

may have a defense predicated upon the guard's reputation for treatment of other inmates' " and that "[t]his was good advice, since Montana admits evidence of the character of the alleged victim to support a claim of self defense." Br. Appellant at 17. Respondent's brief continued on to underscore the "legal advice" nature of the letter to Tracy:

> Had Murphy said, "I think you have a good defense under [*State v. Shadwell*, 57 P. 281 (Mont. 1899)]," we certainly would conclude that his communication was proper and not punishable. But Murphy wrote about the traits themselves. If Murphy had paraphrased *Shadwell* (i.e., "Galle has made threats and has a reputation for violence to inmates") could we say anything different? . . . The Prison has never offered evidence that connects arguably valid advice to any legitimate penological interest.

Id. at 18. Before this Court, though, Respondent took a strikingly different tack, contending that "[t]here is a great distinction between 'writ writing' and Murphy's letter" and, after a description of a legal clerk's duties at the Prison, that:

> Murphy's letter does not fit well under these functions. Rather, his letter is akin to that from a witness in a legal proceeding. ("Tell your lawyer to get a hold of me on this (and this is why)," Murphy wrote.) This is witness language, not lawyer language.

Br. Opp'n Pet. Writ Cert. at 4. This Court should not foster this type of language-parsing and the concomitant burden on state and federal prison administrators.

Finally, it warrants emphasis that the Court of Appeals' analysis is replete with precisely the sort of judicial second-guessing that *Turner*'s reasonableness test is designed to preclude. The court believed, with reference to the first *Turner* factor, that "[t]he Prison . . . has little reason to enforce Rule 009 (Insolence) in this context, since it can easily shield correction officers from any 'alarming' statements contained in inmate mail." Pet. App. 12. The panel relied exclusively on its "shielding" rationale in applying the third and fourth *Turner* considerations. Pet. App. 14. It is nonetheless unclear how prison administrators can prevent correction officers from gaining knowledge indirectly of such statements once communicated from one inmate to another. As to the second factor, the Court of Appeals dismissed out of hand the suggestion that Respondent had an alternative means of conveying his "legal advice,"i.e., sending the letter to Tracy's attorney, with the statement that "nothing in the record indicat[es] that Murphy had access to that lawyer's name or address." Pet. App. 13. There is no reason to doubt, however, Respondent could have made efforts to learn the attorney's identity from Tracy or others, and he bore the burden – which was not carried below – to show the contrary. *O'Lone*, 482 U.S. at 350 ("placing the burden on prison officials to disprove the availability of alternatives . . . fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators").

II. THE COURT OF APPEALS' RELIANCE ON FIRST AMENDMENT ASSOCIATIONAL RIGHTS FOR ITS "LEGAL ADVICE" EXCEPTION TO THE APPLICATION OF THE DISCIPLINARY POLICY CANNOT BE RECONCILED WITH *JONES*.

Aside from the Speech Clause, the Court of Appeals relied on a First Amendment associational interest "to assist other inmates with their legal claims" (Pet. App. 6) as a basis for establishing a freestanding "legal advice" right to immunity from application of MSP 15-001. It cited as the sole authority for this proposition the Ninth Circuit's pre-*Turner* decision in *Rizzo*. Pet. App. 6, 8, 9. In so holding, the court ignored *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), a decision which controls the right-of-association analysis here.[10]

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[10] Other than shedding light on the nature of the Court of Appeals' reasoning, the decision in *Rizzo* adds nothing. *Rizzo* relied on a Tenth Circuit decision, *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981), to find the plaintiff inmate's allegation that, inter alia, "he encouraged and offered to help his fellow students in the vocational course in legal matters" sufficient to state a claim predicated on the theory that the First Amendment protects "any collective action . . . taken to obtain meaningful access to the courts." *Rizzo*, 778 F.2d at 531. *Owens* involved retaliation against a sheriff's department employee for assisting his spouse with a sex discrimination suit against the department. Consequently, not only did *Owens* arise in a non-prison environment, but also it was concerned with a different type of "access to the courts" – that reflected in *NAACP v. Button*, 371 U.S. 415 (1963) – than that relevant to prisoners. *See generally* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 571-80 (1999) (contrasting access-to-court decisions in prisoner and "group litigation" contexts). The *Rizzo* panel did not note this distinction in concluding that the

Jones involved a challenge to a prison regulation prohibiting inmates from soliciting other inmates to join a prisoners' union, barring union meetings, and making the prison mail system unavailable for bulk mailings of union materials. At the outset, the *Jones* Court explained that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls" because "[t]he concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution" and "restrictions on the associational rights among inmates." 433 U.S. at 125-26. This Court then began its substantive analysis with the general deference principle reiterated subsequently in *Turner*:

> The invocation of the First Amendment, whether the asserted rights are speech or associational, does not change th[e] analysis. In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." . . . In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," . . . this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. . . .

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plaintiff inmate possessed a legally cognizable "first amendment right[ ]" to "bring[ ] and assist[ ] in civil rights litigation." 778 F.2d at 532. The panel below also did not acknowledge that distinction.

> These restrictions have applied as well where First Amendment values were implicated.

Id. at 129-30 (citations omitted). The Court found speech rights "barely implicated" by the mail restriction since it affected only the cost attendant to distribution of union material and since "other avenues of outside informational flow by the Union remain available." *Id.* at 130-31. Inmate-to-inmate solicitation of union membership also was held outside Speech Clause protection because, as "an invitation to collectively engage in a legitimately prohibited activity," such solicitation "involves a good deal more than the simple expression of views as to the advantages or disadvantages of a union or its views." *Id.* at 131-32. As for associational interests, the Court stated that "the presence, and perhaps even the objectives, of a prisoners' labor union would be detrimental to order and security of the prisons" and that "[i]t is enough to say that [the prison administrators] have not been conclusively shown to be wrong in this view." *Id.* at 132.

Here, one is hard-pressed to say that associational rights are even "barely implicated" by uniformly imposed, content-neutral disciplinary rules. MSP 15-001 does not preclude inmates from giving "legal advice" to other inmates. Rather, it sanctions specified conduct that is admittedly inconsistent with "reasonable considerations of penal management" without reference to whether that conduct occurs while communicating such advice. *See Jones*, 433 U.S. at 132. The Court of Appeals' characterization of "the Prison's interest in security and order" as being "at a low ebb" (Pet. App. 12) when "legal advice" is being given thus misses the mark badly. Prisoner administrators *always* have an intense "interest in

security and order," and any First Amendment associational rights attendant to the exchange of "legal advice" must give way. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("central to all other correctional goals is the institutional consideration of internal security within the correctional facilities themselves").

Moreover, while *Jones* focused on the overall question whether the involved regulation was reasonably related to legitimate penological interests and did not address separately the considerations later identified in *Turner*, each of those considerations is satisfied here. The first and third *Turner* factors are met because MSP 15-001 admittedly furthers the Prison's interest in security and order and because recognizing a "legal advice" privilege to that policy's application would open the door to conduct potentially impairing institution security or safety interests. The second and fourth are satisfied because nothing in the disciplinary policy precludes an inmate giving "legal advice" to a fellow inmate so long as the disciplinary policy is not violated otherwise.

Jones teaches unambiguously that inmates retain only a modicum of First Amendment associational rights. The Ninth Circuit has sought to expand significantly those rights *and* elevate them above prison administrators' concern for safety and security. Associational interests cannot support such an independent, freestanding right for prisoners to render legal advice in the face of these administrators' responsibility for maintaining institutional integrity through policies like MSP 15-001.

III. THE COURT'S ACCESS-TO-COURTS DOCTRINE DEFINES THE SCOPE OF AN INMATE'S CONSTITUTIONAL ENTITLEMENT TO LEGAL ASSISTANCE FROM A FELLOW INMATE.

The Court of Appeals' Speech Clause and associational right analysis was flawed for another reason: By attaching constitutional status to assistance with any "legal claims," it effectively expands the access-to-courts doctrine through which this Court has accommodated the interest that prisoners have with the validity or conditions of their incarceration. This conclusion becomes strikingly evident when the basic contours of that doctrine are examined in the Court's three most relevant decisions applying it: *Johnson v. Avery*, 393 U.S. 483 (1969); *Bounds v. Smith*, 430 U.S. 817 (1977); and *Lewis v. Casey*, 518 U.S. 343 (1996).

In *Johnson*, the Court invalidated a Tennessee prison regulation that prohibited any inmate from "advis[ing], assist[ing] or otherwise contract[ing] to aid another, either with or without a fee, to prepare Writs or other legal matters." 393 U.S. at 484. The petitioner inmate had been disciplined for the regulation's violation, and this Court found that the practical effect of the writ-writing prohibition was to "forbid[ ] illiterate or poorly educated prisoners to file habeas corpus petitions" (*id.* at 487), since the State did "not provide an available alternative to the assistance provided by other inmates" (*id.* at 488). This Court concluded that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to

other prisoners." *Id.* at 490. Significantly, therefore, rather than creating a freestanding right to assist other inmates as the court below has done, this Court has found such a right to exist only in the absence of alternative forms of legal assistance. *Id.* at 489.

The contours of this right were made more concrete in *Bounds*. There, this Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

Lewis clarified *Bounds* in two respects. This Court explained as to Article III standing: "Insofar as the right vindicated by *Bounds* is concerned, 'meaningful access to the courts is the touchstone,' . . . and the inmate therefore must . . . demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351. *Bounds*, in other words, "did not create an abstract, freestanding right to a law library or legal assistance." *Id. Lewis* additionally made clear that the access-to-courts doctrine is concerned with "tools . . . that the inmates need to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement" and that "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* at 355.[11]

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[11] As Justice Thomas discussed in his *Lewis* concurring opinion, this Court has not "engaged in a rigorous

The Court's *Lewis* decision strikes a constitutionally-rooted balance between the safe and orderly administration of prisons and the ability of inmates to initiate certain types of judicial proceedings. *See Lewis*, 518 U.S. at 350. The Ninth Circuit's approach, however, upsets this balance by expanding greatly the access-to-courts right through an additional restriction on prison administrators' authority; i.e., inmates like Respondent giving "legal advice" can couch retaliation or other claims as a violation of First Amendment rights and thereby avoid the need to show the far more stringent elements of a viable access-to-courts cause of action. Such a result makes no sense because, to the extent "legal advice" may have a value independent of other speech, that value is protected adequately by the access-to-courts doctrine. Any limitation on a prison's authority with respect to controlling inter-prisoner communications over "legal advice"

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constitutional analysis of the basis for the asserted right" of access to the courts (518 U.S. at 367), but it appears such right emanates from the First Amendment's Petition Clause or the Fourteenth Amendment's Due Process or Equal Protection Clauses. *Compare id.* at 381 (Thomas, J., concurring) (identifying the Due Process Clause as the apparent source), *with id.* at 405 (Stevens, J., dissenting) (identifying the Petition Clause as a principal source); *see also Hudson v. Palmer*, 468 U.S. 517, 523 (1984) ("[l]ike others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts"). This issue, as well as the relationship between Speech and Petition Clause standards where an access-to-courts claim is involved, need not be resolved since, as discussed infra at 44, no such claim could be advanced here. *See McDonald v. Smith*, 472 U.S. 479, 485 (1985).

accordingly should come from application of that doctrine, not from the new right conjured out of the First Amendment by the Court of Appeals. *Cf. Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (First Amendment claim "ha[d] no independent significance" in view of the rejection of a due process claim when the latter claim "focused on substantially the same question – whether the process allow[ed] a claimant to make a meaningful presentation"). Indeed, the Ninth Circuit has done precisely what the *Lewis* Court stated *Bounds* did not do: Create a freestanding right to *receive* legal assistance by creating the right to *give* such assistance.

The insufficiency of Respondent's access-to-courts claim is apparent from the undisputed facts. First, Respondent does not allege that he has been denied access to the courts and thus could claim only his relationship to Tracy as a basis for the doctrine's application. This case, however, cannot be analogized to *Johnson* where a "writ-writer" secured relief from sanctions imposed for assisting other prisoners who had no other means to access the courts. *Johnson*, 393 U.S. at 487. Tracy, moreover, had a court-appointed, Montana-licensed attorney to represent him in the criminal proceedings. Even he therefore would have lacked standing under *Lewis* standards. *Lewis*, 518 U.S. at 351.

Second, the criminal proceeding against Tracy fell outside the reach of the access-to-courts doctrine. *See Lewis*, 518 U.S. at 355. Tracy was *haled* into court by the State on criminal charges and provided counsel. His plight was not that of an unaided inmate seeking to invoke the judicial process with the objective of attacking

an existing sentence or condition of confinement but denied the "tools" to do so.

The Court of Appeals, in sum, has asked the First Amendment to do the work of the access-to-courts doctrine. In so doing, the Ninth Circuit upsets the balance struck by this Court in that doctrine. The Court should reject the suggestion that the First Amendment immunizes Respondent's communications simply because they purported to give "legal advice" to a fellow inmate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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